

Hurley, Peggy

From: Murphy, Michael
Sent: Thursday, August 09, 2012 2:19 PM
To: Hurley, Peggy
Subject: FW: Asbestos Tort Reform

Hello Peggy,

Here are the answers to the questions you posed. Let me know if we can be of further help.

Have a great afternoon!

MICHAEL P. MURPHY

OFFICE OF STATE REPRESENTATIVE

André Jacque

2ND ASSEMBLY DISTRICT
P.O. Box 8953 • Madison, WI 53708-8952
(608) 266-9870 • Fax: (608) 282-3602
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Rep.Jacque@legis.wi.gov

1. Do you want this to apply to all personal injury trusts or should this be specific to asbestos claims, like the Ohio legislation?

Yes, it should apply to all trusts since there are similar transparency issues with other trusts.

2. Second, it appears that, once a claim is filed, the defendant can move the court to stay all proceedings while it conducts discovery to determine if the claimant may file a claim against an existing personal injury trust. The Ohio materials indicate, though, that new trusts are being formed all the time, so wouldn't this mean, in practical terms, that a claimant could almost never move forward with his claim?

The law would only apply to trusts that have already been created. The proposed language sets out short timelines and therefore would not preclude a claimant from going forward with his/her claim, e.g. 10-day timeline for the claimant to respond, 60-day timeline for court to certify that discovery is complete. Moreover, the defendant must have a "good faith" basis when proceeding with order to show cause, making it less likely a defendant's attorney will file a frivolous Order to Show Cause.

3. Third, wouldn't a named defendant already be able to argue alternative causation OR that another entity caused the claimant's injury and, if warranted, even bring that entity into the lawsuit? I have similar questions about the provisions regarding set-offs: aren't set-offs already allowed under current law? I am not sure why the proposed language is necessary or how it amends current personal injury law.

To the first part of the question, technically, yes, but defendants don't always know who those other potential defendants might be. There are examples in other states where the plaintiff has denied any other exposure in depositions, yet all along the plaintiff has a separate lawsuit pending against another company.

As for the second part of the question, it is probable that there are separate statutes that provide set-offs, or the court may use its equitable powers to deduct any trust recoveries. However, the purpose of the provision in the proposed legislation is to make certain that defendants are entitled to set-offs or credits in these types of cases.

4. Finally, if this legislation applies to all tort claims for which a personal injury trust may be established, does that mean it would apply to actions brought by the attorney general (I'm thinking specifically of the tobacco litigation)? How would class actions be affected?

I'm not aware of a situation where the AG would be bringing a similar lawsuit. Moreover, there are no trusts set up for tobacco litigation. As for class actions, there have not been any examples of class action lawsuits against these types of trusts, nor would I foresee this occurring.

MICHAEL P. MURPHY

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From: Hurley, Peggy
Sent: Friday, July 06, 2012 12:41 PM
To: Murphy, Michael
Subject: RE: Asbestos Tort Reform

Michael,

I've looked over the materials and I think I'm getting a better understanding of the issues and your goals with this legislation. I do have a couple of questions at this time. First, the language submitted by Andy Cook does not limit this legislation to asbestos claims, but to any personal injury claim for which there may be a "personal injury trust" in existence or even in theory. Do you want this to apply to all personal injury trusts or should this be specific to asbestos claims, like the Ohio legislation?

Second, it appears that, once a claim is filed, the defendant can move the court to stay all proceedings while it conducts discovery to determine if the claimant may file a claim against an existing personal injury trust. The Ohio materials indicate, though, that new trusts are being formed all the time, so wouldn't this mean, in practical terms, that a claimant could almost never move forward with his claim?

Third, wouldn't a named defendant already be able to argue alternative causation OR that another entity caused the claimant's injury and, if warranted, even bring that entity into the lawsuit? I have similar questions about the provisions regarding set-offs: aren't set-offs already allowed under current law? I am not sure why the proposed language is necessary or how it amends current personal injury law.

Finally, if this legislation applies to all tort claims for which a personal injury trust may be established, does that mean it would apply to actions brought by the attorney general (I'm thinking specifically of the tobacco litigation)? How would class actions be affected?

I think that's it for now, but I will continue to work through the materials. Talk with you soon; have a great weekend!

Peggy

Personal Injury Trust Claims

Section I. -- Definitions:

- (1) "Claimant" means any party asserting a personal injury claim, including a plaintiff, counterclaimant, cross-claimant, or third-party plaintiff; if a claim is brought through or on behalf of an estate, the term includes the claimant's decedent; if a claim is brought through or on behalf of a minor or incompetent, the term includes the claimant's parent or guardian.
- (2) "Personal injury claim" means any claim for damages, losses, indemnification, contribution, restitution, or other relief of whatever nature, including punitive damages, arising out of, based on, or in any way related to bodily injury or harm, to the extent such claims are recognized under Wisconsin statutes, including the following:
 - a. Loss of consortium;
 - b. Loss of support;
 - c. Personal injury or death;
 - d. Mental or emotional injury;
 - e. Risk or fear of disease or other injury;
 - f. The costs of medical monitoring or surveillance; or
 - g. Any claim made by or on behalf of any person, or a representative, spouse, parent, minor, or other relative of the person. The term "personal injury claim" does not include a claim for compensatory benefits pursuant to workers' compensation or veterans' benefits.
- (3) "Personal injury trusts" means all trusts, compensation funds or claims facilities, created as a result of bankruptcies or other settlements, including but not limited to all trusts or compensation funds created pursuant to § 524(g) of Title 11, United States Codes, § 40101 of Title 49, United States Code, Wisconsin law or private agreement, intended to provide compensation to claimants alleging personal injury claims as a result of harm for which the entity or event that is subject of the trust or compensation fund is alleged to be responsible.
- (4) "Tort action" means any civil proceeding seeking compensation directly or derivatively as a result, in whole or in part, of bodily injury, harm or death.
- (5) "Trust Claims and Claims Material" means all documents and information, including but not limited to claim forms and supplementary material, relevant or related to pending or potential claims against Personal Injury Trusts.
- (6) "Trust Governance Documents" means documents which determine eligibility and payment levels for the Personal Injury Trusts and include Trust Distribution Procedures, Plans of Reorganization, claims and payment matrices and related orders.



State of Wisconsin
2013 - 2014 LEGISLATURE



LRB-00027

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PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

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1 **AN ACT** relating to: torts and personal injury trusts

Analysis by the Legislative Reference Bureau

This is a preliminary draft. An analysis will be provided in a subsequent version of this draft.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

2 **SECTION 1.** 802.025 of the statutes is created to read:

3 **802.025 Pleading certain personal injury actions; stay of proceedings.**

4 (1) DEFINITIONS. In this section: (a) "Personal injury trust" means a trust or
5 compensation fund, created as a result of a bankruptcy, agreement, or other
6 settlement or pursuant to 11 USC 524 (g) or 49 USC 40101, that is intended to
7 provide compensation to claimants alleging personal injury as a result of harm for
8 which the entity that is subject of the trust or compensation fund is alleged to be
9 responsible.



State of Wisconsin
2013 - 2014 LEGISLATURE



LRB-0002/P2

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PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

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gen act

1 AN ACT *to create* 802.025 of the statutes; relating to: torts and personal injury
2 trusts.

Insert analysis

Analysis by the Legislative Reference Bureau

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The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

3 SECTION 1. 802.025 of the statutes is created to read:
4 **802.025 Pleading certain personal injury actions; stay of proceedings.**
5 (1) DEFINITIONS. In this section: (a) "Personal injury claim" means any claim for
6 damages, loss, indemnification, contribution, restitution or other relief, including
7 punitive damages, that is related to bodily injury or another harm, including loss of
8 consortium, society, or companionship, loss of support, personal injury or death,
9 mental or emotional injury, risk or fear of disease or other injury, or costs of medical

1 monitoring or surveillance. “Personal injury claim” includes a claim made by or on
2 behalf of the person who claims the injury or harm or by or on behalf of the person’s
3 representative, spouse, parent, minor child, or other relative. “Personal injury
4 claim” does not include a claim for compensatory benefits pursuant to worker’s
5 compensation or veterans benefits.

6 (b) “Personal injury trust” means a trust, compensation fund or claims facility
7 created as a result of an administrative or legal action, bankruptcy, agreement, or
8 other settlement or pursuant to 11 USC 524 (g) or 49 USC 40101, that is intended
9 to provide compensation to claimants alleging personal injury claims as a result of
10 harm for which the entity creating the trust, compensation fund, or claims facility
11 is alleged to be responsible.

12 (c) “Trust claims materials” means all documents and information relevant or
13 related to a pending or potential claim against a personal injury trust. “Trust claims
14 materials” include claims forms and supplementary materials, affidavits,
15 depositions and trial testimony, work history, and medical and health records.

16 (d) “Trust governance document” means any document that determines
17 eligibility and payment levels, including claims payment matrices, trust distribution
18 procedures, or plans for reorganization, for a personal injury trust.

19 (2) REQUIRED DISCLOSURES BY PLAINTIFF. (a) Within 30 days after the effective
20 date of this paragraph [LRB inserts date] or within 30 days after an action for a
21 personal injury or other tort is filed in circuit court, the court shall order the plaintiff
22 to provide to the court and to all parties a statement identifying all personal injury
23 claims the plaintiff has or anticipates filing against a personal injury trust that are
24 identical or substantially similar to the claims filed in the immediate action. The
25 statement shall include an attestation that the plaintiff swears or affirms, under

1 penalties of perjury, that the statement is complete and is based on the plaintiff's
2 good faith investigation of all potential claims against personal injury trusts.

3 (b) The court shall order the plaintiff to produce to the court and to all parties,
4 for each personal injury claim he or she filed against a personal injury trust
5 identified in par. (a), a final executed proof of claim and all other trust claims
6 materials relevant to each claim.

7 (c) The court shall order the plaintiff to produce to the court and to all parties,
8 for each personal injury claim he or she anticipates filing against a personal injury
9 trust identified in par. (a), all trust claims materials relevant to each claim. The court
10 shall order the plaintiff to produce to the court and to all parties a final executed proof
11 of claim for each claim when the plaintiff files the claim.

12 (d) The court shall order the plaintiff to supplement the information and
13 materials he or she provided pursuant to each order entered under par. (a), (b), or (c)
14 within 30 days after the plaintiff files an additional claim or receives additional
15 information or materials.

16 (e) Notwithstanding par. (d), the plaintiff may not, less than 30 days prior to
17 trial, amend or supplement the information or materials he or she provided pursuant
18 to this subsection to identify an additional personal injury claim or an additional
19 personal injury trust against which he or she may have a claim without leave of the
20 court. The court may not grant leave to the plaintiff under this paragraph unless the
21 court finds that mistake, inadvertence, surprise, excusable neglect, or fraud
22 prevented the timely inclusion of the information or materials.

23 **(3) DISCOVERY; USE OF MATERIALS.** (a) The court shall presume trust claims
24 materials and trust governance documents to be relevant and authentic and shall
25 allow any party to present the trust claims materials to prove alternative causation

1 for a plaintiff's injuries or to allocate liability for the plaintiff's injury. No claims of
2 privilege may apply to trust claims materials or trust governance documents.

3 (b) A defendant in a personal injury claim may seek discovery against a
4 personal injury trust identified under sub. (2). The plaintiff may not claim privilege
5 or confidentiality to bar discovery under this paragraph and shall provide consent
6 or other expression of permission that may be required by the personal injury trust
7 to release information and materials sought by the defendant.

8 (4) SCHEDULING TRIAL; STAY OF ACTION. (a) The court may not schedule a trial
9 in a personal injury action until at least 180 days after the plaintiff makes the
10 disclosures required under sub. (2). This paragraph does not apply if the plaintiff
11 states pursuant to sub. (2) that he or she has not filed and does not anticipate filing
12 any claim against a personal injury trust that is identical or substantially similar to
13 the claims filed in the immediate action.

14 (b) If a party states under sub. (2) that he or she anticipates a claim against a
15 personal injury trust, the court shall stay all proceedings until the party files his or
16 her claim against the personal injury trust and provides to the court and to all parties
17 a final executed proof of claim and all other trust claims materials relevant to each
18 claim the party has against a personal injury trust. The party shall also state
19 whether there has been a request to defer, delay, suspend, or toll the claim against
20 the personal injury trust.

21 (5) DEFENDANT'S IDENTIFICATION OF ADDITIONAL OR ALTERNATIVE PERSONAL INJURY
22 TRUSTS. (a) Any defendant may move the court for an order under par. (d) by
23 identifying a personal injury trust against which the defendant in good faith believes
24 the plaintiff can file a successful claim. For each personal injury trust a defendant
25 identifies, the defendant shall produce or describe the evidence sufficient to meet the

1 personal injury trust distribution procedure requirements to file a valid claim and
2 the amount of money the trust should pay for the claim.

3 (b) Within 10 days of receiving a motion under par. (a), the plaintiff shall, for
4 each personal injury trust identified by the defendant, do one of the following:

5 1. File a claim with the personal injury trust.

6 2. File a written response with the court that sets forth reasons why there is
7 insufficient evidence to permit the plaintiff to file a claim in good faith under the
8 personal injury trust distribution procedure identified by the defendant.

9 (c) The court shall determine, for each personal injury trust identified under
10 par. (a), whether there is a good faith basis for the plaintiff to file a claim with the
11 personal injury trust. The plaintiff shall have the burden of proving that he or she
12 does not meet criteria set forth in the personal injury trust's trust governance
13 documents.

14 (d) If the court determines that there is a good faith basis for the plaintiff to file
15 a claim against a personal injury trust identified by a defendant, the court shall order
16 the plaintiff to file a claim with the personal injury trust and shall stay the
17 immediate action until the plaintiff swears or affirms that he or she has filed the
18 claim against the personal injury trust and the plaintiff provides to the court and to
19 all parties a final executed proof of claim and all other trust claims materials relevant
20 to each claim the plaintiff has against a personal injury trust.

21 (e) Not less than 60 days after the plaintiff provides the documentation
22 required under par. (d), the court may schedule the plaintiff's action for trial.

23 (f) Not less than 30 days prior to trial, the court shall enter into the record a
24 trust claims document that identifies each personal injury claim the plaintiff has
25 made against a personal injury trust. The court may not amend this document

that is identical to or substantially similar to a claim filed in the immediate action.

1 unless the court finds that mistake, inadvertence, surprise, excusable neglect, or
2 fraud prevented the timely inclusion of relevant information or materials.

3 (6) VALUATION OF PERSONAL INJURY TRUST CLAIMS; JUDICIAL NOTICE. If a plaintiff
4 proceeds to trial under this section before one of more of his or her personal injury
5 trust claims is resolved, there is a rebuttable presumption that the plaintiff is
6 entitled to, and will receive, the compensation specified in the trust governance
7 document applicable to his or her claim. The court shall take judicial notice that the
8 trust governance document specifies compensation amounts and shall establish an
9 attributed value to the plaintiff's personal injury trust claim.

10 (7) SETOFFS; CREDIT. In any personal injury claim for which damages are
11 awarded, a defendant is entitled to a setoff or credit in the amount of the valuation
12 established under sub. (6) and any amount the plaintiff has been awarded from a
13 personal injury trust claim identified in sub. (5) (f). If multiple defendants are found
14 liable for damages, the court shall distribute the amount of setoff or credit
15 proportionally, according to the liability of each defendant. No defendant may, by
16 virtue of settlement or other disposition of the action, claim more than its
17 proportionate share of the amount of setoff or credit to which it is entitled under this
18 section.

19 (8) FAILURE TO PROVIDE INFORMATION; SANCTIONS. A plaintiff who fails to provide
20 all of the information required under subs. (2), (4) (b), or (5) (d) is subject to ss. 802.05,
21 804.12, 805.03, and 895.044.

22 **SECTION 2. Initial applicability.**

1 (1) This act first applies to actions filed on the effective date of this subsection
2 and to actions pending on the effective date of this subsection if trial has not
3 commenced in the action.

4 (END)

1

INSERT ANALYSIS:

This bill creates discovery and scheduling requirements for certain types of tort actions and limits a defendant's liability for a plaintiff's injury under certain circumstances. Under the bill, a plaintiff who files a tort action must disclose, within 30 days after he or she files the action, whether he or she has filed or anticipates filing a substantially similar claim against a personal injury trust. A personal injury trust is a trust or compensation fund that is established pursuant to a bankruptcy or other legal action in order to compensate persons damaged by the entity that established the personal injury trust.

Under the bill, if the plaintiff indicates that he or she has filed or anticipates filing a claim against a personal injury trust, the bill requires the court to stay the immediate proceedings until the plaintiff produces a final executed proof of claim against the personal injury trust. The bill also allows a defendant to identify a personal injury trust not named by the plaintiff, but against whom the defendant believes the plaintiff has a legitimate claim. If the court agrees that there is a good faith basis for the plaintiff to file a claim against the personal injury trust, the bill requires the court to order the plaintiff to file a claim against the trust and stay the proceedings until the plaintiff produces a final executed proof of claim against the personal injury trust.

Under the bill, the plaintiff must provide all parties to his or her immediate suit with all documents, records, trial or discovery materials, and other information relevant to any similar claim against a personal injury trust. The bill allows any party to use these materials in the immediate action to prove alternate causation of, or to allocate liability for, the plaintiff's injury. The bill allows a defendant in the immediate action to seek discovery from a personal injury trust against which the plaintiff has filed or anticipates filing an action.

The bill requires the court to enter into the record a list that identifies each personal injury the claim the plaintiff has made against a personal injury trust that is substantially similar to a claim the plaintiff is making in the immediate action. Under the bill, the court may not amend this list except upon a showing of unusual circumstances.

Under the bill, if a defendant in the immediate action is found liable for the plaintiff's injury, the defendant is entitled to a setoff in the amount of any money the plaintiff received from a personal injury trust for a substantially similar injury. If the immediate action proceeds to trial before the plaintiff's claim against a personal injury trust is resolved, the bill requires the court to establish an attributed value to the plaintiff's claim against the personal injury trust and to afford the defendant a setoff in that amount.

For further information see the *state and local* fiscal estimate, which will be printed as an appendix to this bill.

Hurley, Peggy

From: Julian, Jamie
Sent: Tuesday, December 18, 2012 12:22 PM
To: Hurley, Peggy
Subject: Requested language for 'personal injury trust'

“Personal injury trust” means a trust, compensation fund or claims facility created as a result of an administrative or legal action, bankruptcy, agreement or other settlement or pursuant to 11 USC 524(g) or 49 USC 40101, that is intended to provide compensation to claimants alleging personal injury claims as a result of harm, **also potentially compensable in the immediate tort action**, for which the entity creating the trust, compensation fund, or claims facility is alleged to be responsible.

Jamie Julian

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State of Wisconsin
2013 - 2014 LEGISLATURE



LRB-0002/P2
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P3

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

12-18-12
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1 AN ACT *to create* 802.025 of the statutes; relating to: torts and personal injury
2 trusts. *who file claims as a result*
of harm potentially compensable in the plaintiff's
tort action, for which

Analysis by the Legislative Reference Bureau

This bill creates discovery and scheduling requirements for certain types of tort actions and limits a defendant's liability for a plaintiff's injury under certain circumstances. Under the bill, a plaintiff who files a tort action must disclose, within 30 days after he or she files the action, whether he or she has filed or anticipates filing a substantially similar claim against a personal injury trust. A personal injury trust is a trust or compensation fund that is established pursuant to a bankruptcy or other legal action in order to compensate persons damaged by the entity that established the personal injury trust *is alleged to be responsible*

Under the bill, if the plaintiff indicates that he or she has filed or anticipates filing a claim against a personal injury trust, the bill requires the court to stay the immediate proceedings until the plaintiff produces a final executed proof of claim against the personal injury trust. The bill also allows a defendant to identify a personal injury trust not named by the plaintiff, but against whom the defendant believes the plaintiff has a legitimate claim. If the court agrees that there is a good faith basis for the plaintiff to file a claim against the personal injury trust, the bill requires the court to order the plaintiff to file a claim against the trust and stay the proceedings until the plaintiff produces a final executed proof of claim against the personal injury trust.

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relevant to any similar claim against a personal injury trust. The bill allows any party to use these materials in the immediate action to prove alternate causation of, or to allocate liability for, the plaintiff's injury. The bill allows a defendant in the immediate action to seek discovery from a personal injury trust against which the plaintiff has filed or anticipates filing an action.

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For further information see the *state and local* fiscal estimate, which will be printed as an appendix to this bill.

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5 punitive damages, that is related to bodily injury or another harm, including loss of
6 consortium, society, or companionship, loss of support, personal injury or death,
7 mental or emotional injury, risk or fear of disease or other injury, or costs of medical
8 monitoring or surveillance. "Personal injury claim" includes a claim made by or on
9 behalf of the person who claims the injury or harm or by or on behalf of the person's
10 representative, spouse, parent, minor child, or other relative. "Personal injury
11 claim" does not include a claim for compensatory benefits pursuant to worker's
12 compensation or veterans benefits.

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(b) "Personal injury trust" means a trust, compensation fund or claims facility created as a result of an administrative or legal action, bankruptcy, agreement, or other settlement or pursuant to 11 USC 524 (g) or 49 USC 40101, that is intended to provide compensation to claimants alleging personal injury claims as a result of harm for which the entity creating the trust, compensation fund, or claims facility is alleged to be responsible.

(c) "Trust claims materials" means all documents and information relevant or related to a pending or potential claim against a personal injury trust. "Trust claims materials" include claims forms and supplementary materials, affidavits, depositions and trial testimony, work history, and medical and health records.

(d) "Trust governance document" means any document that determines eligibility and payment levels, including claims payment matrices, trust distribution procedures, or plans for reorganization, for a personal injury trust.

(2) REQUIRED DISCLOSURES BY PLAINTIFF. (a) Within 30 days after the effective date of this paragraph [LRB inserts date] or within 30 days after an action for a personal injury or other tort is filed in circuit court, the court shall order the plaintiff to provide to the court and to all parties a statement identifying all personal injury claims the plaintiff has or anticipates filing against a personal injury trust that are identical or substantially similar to the claims filed in the immediate action. The statement shall include an attestation that the plaintiff swears or affirms, under penalties of perjury, that the statement is complete and is based on the plaintiff's good faith investigation of all potential claims against personal injury trusts.

(b) The court shall order the plaintiff to produce to the court and to all parties, for each personal injury claim he or she filed against a personal injury trust

and for each claim, whether there has been a request to defer, delay, suspend, or toll the claim against the personal injury trust.

1 identified in par. (a), a final executed proof of claim and all other trust claims
2 materials relevant to each claim.

3 (c) The court shall order the plaintiff to produce to the court and to all parties,
4 for each personal injury claim he or she anticipates filing against a personal injury
5 trust identified in par. (a), all trust claims materials relevant to each claim. The court
6 shall order the plaintiff to produce to the court and to all parties a final executed proof
7 of claim for each claim when the plaintiff files the claim.

8 (d) The court shall order the plaintiff to supplement the information and
9 materials he or she provided pursuant to each order entered under par. (a), (b), or (c)
10 within 30 days after the plaintiff files an additional claim or receives additional
11 information or materials.

12 (e) Notwithstanding par. (d), the plaintiff may not, less than 30 days prior to
13 trial, amend or supplement the information or materials he or she provided pursuant
14 to this subsection to identify an additional personal injury claim or an additional
15 personal injury trust against which he or she may have a claim without leave of the
16 court. The court may not grant leave to the plaintiff under this paragraph unless the
17 court finds that mistake, inadvertence, surprise, excusable neglect, or fraud
18 prevented the timely inclusion of the information or materials.

19 (3) DISCOVERY; USE OF MATERIALS. (a) The court shall presume trust claims
20 materials and trust governance documents to be relevant and authentic and shall
21 allow any party to present the trust claims materials to prove alternative causation
22 for a plaintiff's injuries or to allocate liability for the plaintiff's injury. No claims of
23 privilege may apply to trust claims materials or trust governance documents.

24 (b) A defendant in a personal injury claim may seek discovery against a
25 personal injury trust identified under sub. (2). The plaintiff may not claim privilege

without limitation

1 or confidentiality to bar discovery under this paragraph and shall provide consent
2 or other expression of permission that may be required by the personal injury trust
3 to release information and materials sought by the defendant.

4 (4) SCHEDULING TRIAL; STAY OF ACTION. (a) The court may not schedule a trial
5 in a personal injury action until at least 180 days after the plaintiff makes the
6 disclosures required under sub. (2). This paragraph does not apply if the plaintiff
7 states pursuant to sub. (2) that he or she has not filed and does not anticipate filing
8 any claim against a personal injury trust that is identical or substantially similar to
9 the claims filed in the immediate action.

10 (b) If a party states under sub. (2) that he or she anticipates a claim against a
11 personal injury trust, the court shall stay all proceedings until the party files his or
12 her claim against the personal injury trust and provides to the court and to all parties
13 a final executed proof of claim and all other trust claims materials relevant to each
14 claim the party has against a personal injury trust. The party shall also state
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21 identifies, the defendant shall produce or describe the evidence sufficient to meet the
22 personal injury trust distribution procedure requirements to file a valid claim and
23 the amount of money the trust should pay for the claim.

24 (b) Within 10 days of receiving a motion under par. (a), the plaintiff shall, for
25 each personal injury trust identified by the defendant, do one of the following:

1 1. File a claim with the personal injury trust.

2 2. File a written response with the court that sets forth reasons why there is
3 insufficient evidence to permit the plaintiff to file a claim in good faith under the
4 personal injury trust distribution procedure identified by the defendant.

5 (c) The court shall determine, for each personal injury trust identified under
6 par. (a), whether there is a good faith basis for the plaintiff to file a claim with the
7 personal injury trust. The plaintiff shall have the burden of proving that he or she
8 does not meet criteria set forth in the personal injury trust's trust governance
9 documents.

10 (d) If the court determines that there is a good faith basis for the plaintiff to file
11 a claim against a personal injury trust identified by a defendant, the court shall order
12 the plaintiff to file a claim with the personal injury trust and shall stay the
13 immediate action until the plaintiff swears or affirms that he or she has filed the
14 claim against the personal injury trust and the plaintiff provides to the court and to
15 all parties a final executed proof of claim and all other trust claims materials relevant
16 to each claim the plaintiff has against a personal injury trust.

17 (e) Not less than 60 days after the plaintiff provides the documentation
18 required under par. (d), the court may schedule the plaintiff's action for trial.

19 (f) Not less than 30 days prior to trial, the court shall enter into the record a
20 trust claims document that identifies each personal injury claim the plaintiff has
21 made against a personal injury trust that is identical to or substantially similar to
22 a claim filed in the immediate action. The court may not amend this document unless
23 the court finds that mistake, inadvertence, surprise, excusable neglect, or fraud
24 prevented the timely inclusion of relevant information or materials.

1 (6) VALUATION OF PERSONAL INJURY TRUST CLAIMS; JUDICIAL NOTICE. If a plaintiff
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3 trust claims is resolved, there is a rebuttable presumption that the plaintiff is
4 entitled to, and will receive, the compensation specified in the trust governance
5 document applicable to his or her claim. The court shall take judicial notice that the
6 trust governance document specifies compensation amounts and shall establish an
7 attributed value to the plaintiff's personal injury trust claim.

8 (7) SETOFFS; CREDIT. In any personal injury claim for which damages are
9 awarded, a defendant is entitled to a setoff or credit in the amount of the valuation
10 established under sub. (6) and any amount the plaintiff has been awarded from a
11 personal injury trust claim identified in sub. (5) (f). If multiple defendants are found
12 liable for damages, the court shall distribute the amount of setoff or credit
13 proportionally, according to the liability of each defendant. No defendant may, by
14 virtue of settlement or other disposition of the action, claim more than its
15 proportionate share of the amount of setoff or credit to which it is entitled under this
16 section.

17 (8) FAILURE TO PROVIDE INFORMATION; SANCTIONS. A plaintiff who fails to provide
18 all of the information required under subs. (2), (4) (b), or (5) (d) is subject to ss. 802.05,
19 804.12, 805.03, and 895.044.

20 **SECTION 2. Initial applicability.**

21 (1) This act first applies to actions filed on the effective date of this subsection
22 and to actions pending on the effective date of this subsection if trial has not
23 commenced in the action.

24 (END)



State of Wisconsin
2013 - 2014 LEGISLATURE



LRB-0002/PS
PJH:sac:im

mr

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

1-7-13
gen cat

1 AN ACT *to create* 802.025 of the statutes; **relating to:** torts and personal injury
2 trusts.

Analysis by the Legislative Reference Bureau

This bill creates discovery and scheduling requirements for certain types of tort actions and limits a defendant's liability for a plaintiff's injury under certain circumstances. Under the bill, a plaintiff who files a tort action must disclose, within 30 days after he or she files the action, whether he or she has filed or anticipates filing a claim against a personal injury trust. A personal injury trust is a trust or compensation fund that is established pursuant to a bankruptcy or other legal action in order to compensate persons who file claims as a result of harm potentially compensable in the plaintiff's tort action, for which the entity that established the personal injury trust is alleged to be responsible.

Under the bill, if the plaintiff indicates that he or she has filed or anticipates filing a claim against a personal injury trust, the bill requires the court to stay the immediate proceedings until the plaintiff produces a final executed proof of claim against the personal injury trust. The bill also allows a defendant to identify a personal injury trust not named by the plaintiff, but against whom the defendant believes the plaintiff has a legitimate claim. If the court agrees that there is a good faith basis for the plaintiff to file a claim against the personal injury trust, the bill requires the court to order the plaintiff to file a claim against the trust and stay the proceedings until the plaintiff produces a final executed proof of claim against the personal injury trust.

Under the bill, the plaintiff must provide all parties to his or her immediate suit with all documents, records, trial or discovery materials, and other information

relevant to any claim against a personal injury trust. The bill allows any party to use these materials in the immediate action to prove alternate causation of, or to allocate liability for, the plaintiff's injury. The bill allows a defendant in the immediate action to seek discovery from a personal injury trust against which the plaintiff has filed or anticipates filing an action.

The bill requires the court to enter into the record a list that identifies each personal injury the claim the plaintiff has made against a personal injury trust.

Under the bill, if a defendant in the immediate action is found liable for the plaintiff's injury, the defendant is entitled to a setoff in the amount of any money the plaintiff received from a personal injury trust for a substantially similar injury. If the immediate action proceeds to trial before the plaintiff's claim against a personal injury trust is resolved, the bill requires the court to establish an attributed value to the plaintiff's claim against the personal injury trust and to afford the defendant a setoff in that amount.

For further information see the *state and local* fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 **SECTION 1.** 802.025 of the statutes is created to read:

2 **802.025 Pleading certain personal injury actions; stay of proceedings.**

3 **(1) DEFINITIONS.** In this section: (a) "Personal injury claim" means any claim for
4 damages, loss, indemnification, contribution, restitution or other relief, including
5 punitive damages, that is related to bodily injury or another harm, including loss of
6 consortium, society, or companionship, loss of support, personal injury or death,
7 mental or emotional injury, risk or fear of disease or other injury, or costs of medical
8 monitoring or surveillance. "Personal injury claim" includes a claim made by or on
9 behalf of the person who claims the injury or harm or by or on behalf of the person's
10 representative, spouse, parent, minor child, or other relative. "Personal injury
11 claim" does not include a claim for compensatory benefits pursuant to worker's
12 compensation or veterans benefits.

1 (b) “Personal injury trust” means a trust, compensation fund or claims facility
2 created as a result of an administrative or legal action, bankruptcy, agreement, or
3 other settlement or pursuant to 11 USC 524 (g) or 49 USC 40101, that is intended
4 to provide compensation to claimants alleging personal injury claims as a result of
5 harm, also potentially compensable in the immediate action, for which the entity
6 creating the trust, compensation fund, or claims facility is alleged to be responsible.

7 (c) “Trust claims materials” means all documents and information relevant or
8 related to a pending or potential claim against a personal injury trust. “Trust claims
9 materials” include claims forms and supplementary materials, affidavits,
10 depositions and trial testimony, work history, and medical and health records.

11 (d) “Trust governance document” means any document that determines
12 eligibility and payment levels, including claims payment matrices, trust distribution
13 procedures, or plans for reorganization, for a personal injury trust.

14 (2) REQUIRED DISCLOSURES BY PLAINTIFF. (a) Within 30 days after the effective
15 date of this paragraph [LRB inserts date] or within 30 days after an action for a
16 personal injury or other tort is filed in circuit court, the court shall order the plaintiff
17 to provide to the court and to all parties a statement identifying all personal injury
18 claims the plaintiff has or anticipates filing against a personal injury trust, and for
19 each claim, whether there has been a request to defer, delay, suspend, or toll the claim
20 against the personal injury trust. The statement shall include an attestation that
21 the plaintiff swears or affirms, under penalties of perjury, that the statement is
22 complete and is based on the plaintiff’s good faith investigation of all potential claims
23 against personal injury trusts.

24 (b) The court shall order the plaintiff to produce to the court and to all parties,
25 for each personal injury claim he or she filed against a personal injury trust

1 identified in par. (a), a final executed proof of claim and all other trust claims
2 materials relevant to each claim.

3 (c) The court shall order the plaintiff to produce to the court and to all parties,
4 for each personal injury claim he or she anticipates filing against a personal injury
5 trust identified in par. (a), all trust claims materials relevant to each claim. The court
6 shall order the plaintiff to produce to the court and to all parties a final executed proof
7 of claim for each claim when the plaintiff files the claim.

8 (d) The court shall order the plaintiff to supplement the information and
9 materials he or she provided pursuant to each order entered under par. (a), (b), or (c)
10 within 30 days after the plaintiff files an additional claim or receives additional
11 information or materials.

12 (3) DISCOVERY; USE OF MATERIALS. (a) The court shall presume trust claims
13 materials and trust governance documents to be relevant and authentic and shall
14 allow any party to present the trust claims materials to prove, without limitation,
15 alternative causation for a plaintiff's injuries or to allocate liability for the plaintiff's
16 injury. No claims of privilege may apply to trust claims materials or trust governance
17 documents.

18 (b) A defendant in a personal injury claim may seek discovery against a
19 personal injury trust identified under sub. (2). The plaintiff may not claim privilege
20 or confidentiality to bar discovery under this paragraph and shall provide consent
21 or other expression of permission that may be required by the personal injury trust
22 to release information and materials sought by the defendant.

23 (4) SCHEDULING TRIAL; STAY OF ACTION. (a) The court may not schedule a trial
24 in a personal injury action until at least 180 days after the plaintiff makes the
25 disclosures required under sub. (2). This paragraph does not apply if the plaintiff

1 states pursuant to sub. (2) that he or she has not filed and does not anticipate filing
2 any claim against a personal injury trust.

3 (b) If a party states under sub. (2) that he or she anticipates a claim against a
4 personal injury trust, the court shall stay all proceedings until the party files his or
5 her claim against the personal injury trust and provides to the court and to all parties
6 a final executed proof of claim and all other trust claims materials relevant to each
7 claim the party has against a personal injury trust. The party shall also state
8 whether there has been a request to defer, delay, suspend, or toll the claim against
9 the personal injury trust.

10 (5) DEFENDANT'S IDENTIFICATION OF ADDITIONAL OR ALTERNATIVE PERSONAL INJURY
11 TRUSTS. (a) Any defendant may move the court for an order under par. (d) by
12 identifying a personal injury trust against which the defendant in good faith believes
13 the plaintiff can file a successful claim. For each personal injury trust a defendant
14 identifies, the defendant shall produce or describe the evidence sufficient to meet the
15 personal injury trust distribution procedure requirements to file a valid claim and
16 the amount of money the trust should pay for the claim.

17 (b) Within 10 days of receiving a motion under par. (a), the plaintiff shall, for
18 each personal injury trust identified by the defendant, do one of the following:

19 1. File a claim with the personal injury trust.

20 2. File a written response with the court that sets forth reasons why there is
21 insufficient evidence to permit the plaintiff to file a claim in good faith under the
22 personal injury trust distribution procedure identified by the defendant.

23 (c) The court shall determine, for each personal injury trust identified under
24 par. (a), whether there is a good faith basis for the plaintiff to file a claim with the
25 personal injury trust. The plaintiff shall have the burden of proving that he or she

1 does not meet criteria set forth in the personal injury trust's trust governance
2 documents.

3 (d) If the court determines that there is a good faith basis for the plaintiff to file
4 a claim against a personal injury trust identified by a defendant, the court shall order
5 the plaintiff to file a claim with the personal injury trust and shall stay the
6 immediate action until the plaintiff swears or affirms that he or she has filed the
7 claim against the personal injury trust and the plaintiff provides to the court and to
8 all parties a final executed proof of claim and all other trust claims materials relevant
9 to each claim the plaintiff has against a personal injury trust.

10 (e) Not less than 60 days after the plaintiff provides the documentation
11 required under par. (d), the court may schedule the plaintiff's action for trial.

12 (f) Not less than 30 days prior to trial, the court shall enter into the record a
13 trust claims document that identifies each personal injury claim the plaintiff has
14 made against a personal injury trust.

15 (6) VALUATION OF PERSONAL INJURY TRUST CLAIMS; JUDICIAL NOTICE. If a plaintiff
16 proceeds to trial under this section before one of more of his or her personal injury
17 trust claims is resolved, there is a rebuttable presumption that the plaintiff is
18 entitled to, and will receive, the compensation specified in the trust governance
19 document applicable to his or her claim. The court shall take judicial notice that the
20 trust governance document specifies compensation amounts and shall establish an
21 attributed value to the plaintiff's personal injury trust claim.

22 (7) SETOFFS; CREDIT. In any personal injury claim for which damages are
23 awarded, a defendant is entitled to a setoff or credit in the amount of the valuation
24 established under sub. (6) and any amount the plaintiff has been awarded from a
25 personal injury trust claim identified in sub. (5) (f). If multiple defendants are found

1 liable for damages, the court shall distribute the amount of setoff or credit
2 proportionally, according to the liability of each defendant.

3 (8) FAILURE TO PROVIDE INFORMATION; SANCTIONS. A plaintiff who fails to provide
4 all of the information required under subs. (2), (4) (b), or (5) (d) is subject to ss. 802.05,
5 804.12, 805.03, and 895.044.

6 **SECTION 2. Initial applicability.**

7 (1) This act first applies to actions filed on the effective date of this subsection
8 and to actions pending on the effective date of this subsection if trial has not
9 commenced in the action.

10 (END)

Rose, Stefanie

From: Rep.Jacque
Sent: Tuesday, February 05, 2013 4:16 PM
To: LRB.Legal
Subject: Draft Review: LRB -0002/1 Topic: Civil liability trusts

Please Jacket LRB -0002/1 for the ASSEMBLY.

Jamie Julian

266-9870